Supreme Court of the United States

OCTOBER TERM 1943

No. 754

RUFUS MESHBERGER and LELIA B. MESHBERGER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully present their petition for rehearing.

As stated in the motion requesting the court to state the reasons why certiorari was denied, which is presented with

this petition for rehearing, the petitioners do not know why their petition was denied. Consequently until they are informed, they must proceed in the best way they can under the existing circumstances.

The legislative branch of the United States government has done its part under its constitutional power to legislate on the subject of bankruptcies by enacting Chapters 8, 9, 10, 11, 12, 13, 14 and 15 of the Bankruptcy Act as codified at 11 U. S. C. The provisions of these chapters are permanent except those for municipalities and for farmer debtors which have been extended to 1946. The last two times that Section 75 was extended it was done for the purpose of giving time for a thorough revision of it. There is no doubt that it will be made permanent.

This legislation for the relief of individual, farmer, railroad, municipal, corporate, realty owner, wage earner and ship owner debtors greatly enlarged the exercise of the bankruptcy power delegated to the Congress in the Constitution.. The Act of March 3, 1933, being Chapter 8 of the Bankruptcy Act, which initiated the extension of the exercise of the granted power, was enacted upon the recommendations of the President, of the Chief Justice, and of the Department of Justice. Those eight chapters now provide adequate legal machinery for the relief of debtors without the surrender of their property to creditors. This is accomplished by transferring the lien and claims of creditors to the value of the debtor's property in place of permitting the property itself to be transferred to creditors. It is indeed a great progress from the original Roman bankruptcy law which permitted the creditors to dismember the body of their unfortunate debtor.

The age-old procedure of making secured loans to the

owners of property and taking the property from them when values are low has thus been legislatively extinguished. It was the legislative purpose, which is inviolable under the constitutional power exercised by the Congress, to forestall what exists in China today. That nation of vast potential aggregate wealth and resources lies relatively impotent and divided against itself because its small farmers have been dispossessed of their lands by grasping absentee money lenders who have seized mortgaged farm lands.

Had it not been for the enactment of these eight new chapters the producing property of our people would by this time have been in the hands of new, and mostly absentee, owners and the United States of America would be on the Chinese Road. It is only at the beginning of the turning that such a social and political calamity can be averted.

But our tripartite government of checked and balanced legislative, executive and judicial powers does not execute its will by the mere legislation of a national policy. It remains partly or wholly impotent without the cooperation and support of the judiciary. Against the first attacks, by those who never learn and never forget, upon the new debtor policy promulgated by the legislative branch of the government, it was wholly sustained fundamentally by this court and accepted in practice by creditors as to every class of debtors except alone farmer debtors.

The farmer debtor law as it was first enacted, as Section 75 (a) to (r), was an innocuous bit of legislation which by itself accomplished nothing but a slowing down of the inevitable foreclosure and seizure of the farmer debtor's farm. During the slow-down all the farmer debtor could do was to make a proposal to his creditors which they could accept or reject. It was only when the farmers insisted

that there should be no further debtor legislation for railroads and other corporate debtors until some teeth were put into the farmer debtor law, similar to those already in the corporate debtor laws, that the first Section 75 (s) was enacted.

From that time, that is from the passage of the first Section 75 (s), to the present moment the mortgage holders, and their sympathizers, have unceasingly contested the farmer debtor law. The federal land banks which were established to "solve the farm debt problem" and which have constantly been supported by the government, have been the leaders and encouragers of all farm mortgage holders who resist the constitutional legislative power of the nation. With their large, permanently retained legal staffs they have lead the attacks for all farm creditors.

Nothwithstanding the essential similarity in effect of the original Section 75 (s) to the corporate and railroad debtor laws, it was thrown out in *Louisville* v. *Radford,* 1935, 295 U. S. 555, chiefly because it deprived the mortgage holder of its "right to have a public sale at which it could bid." The attack against that enactment was secretly financed by the Association of Life Insurance Presidents none of whose members or their insurance companies, was party to the suit directly or indirectly. It was disclosed several years later that they spent in that battle to defeat the farmer debtor law the sum of $63,790.63, which was about fourteen times what the farm in that case was worth. Investigation of Concentration of Economic Power, Temporary National Economic Committee, 1939, 76th Congress, First Session, pages 4345 to 4555 and Exhibit No. 963 at page 4750.

After the Congress enacted the present Section 75 (s) to succeed the first, and put in it at Section 75 (s) (3) the provision that a farmer debtor might redeem his farm at its appraised value provided that the court must order a public sale if any secured creditor in writing requested it, this court in *Wright* v. *Union Central,* 1940, 311 U. S. 273 held that no such sale could be held until the farmer debtor first had an opportunity to redeem his farm at its value. That decision thus overruled the holding in *Louisville* v. *Radford,* 295 U. S. 555, that a public sale at which it could bid was one of the "rights" of a mortgage holder of which he could not constitutionally be deprived.

When the present Section 75 (s) came before this court on the question of its constitutionality, it was sustained in *Wright* v. *Vinton,* 1937, 300 U. S. 440, with, however, a suggestion in the text and in Note 6 at page 462 of the opinion that for lack of "a reasonable hope" or for lack of "good faith" a farmer debtor proceeding might lawfully be dismissed. That construction was reversed and disapproved in *John Hancock* v. *Bartels,* 1939, 308 U. S. 180, by the whole tenor of the opinion and expressly in Note 3. Also see *Wright* v. *Logan,* 1942, 315 U. S. 139.

These fundamental judicial determinations have not deterred the mortgage holders from continuing their unremitting attempts to break down the purpose of the law in its operation. In *Union Joint Stock Land Bank* v. *Byerly,* 1940, 310 U. S. 1, against the vigorous dissent of three Justices who held that the decision defeated the purposes of the law and provided a ready means of circumventing it, it was held that though a bankruptcy court, without any notice or hearing unlawfully purported to authorize a state court to proceed in foreclosure, the act of the state court

became valid, even though the farmer debtor knew nothing of the act of the bankruptcy court or of the act of the state court.

In *Pfister* v. *Northern Illinois,* 1942, 317 U. S. 144, the decision of the lower courts that a district judge has no jurisdiction to consider a petition for review after the lapse of the ten days named in Section 39(c) of the Bankruptcy Act was reversed. Farmer debtors think it significant that the same district court, by the same judge, had previously held that it had such jurisdiction. Although the lower courts were so reversed on the main legal issue, a century old precedent, repeatedly and uniformly observed by federal courts and approved by this court, was changed so that whether a court "entertains" a petition for rehearing and consequently "whether time for appeal would be enlarged or not would depend upon what the order showed the court did." Quoted from the opinion at page 151. That is, an application for rehearing of an order is filed at the price of learning whether time for appeal has expired or been extended, only by the content and wording of the subsequent order denying it. For in nearly every instance the thirty days for appeal will have expired before the conciliation commissioner has acted upon the application for rehearing. In other words it is the ultimate form in which the conciliation commissioner puts his denial of an application for rehearing which discloses whether he has "entertained" it and this is true even though, as in that case, he state in his finding that he had fully considered the whole proceeding.

The practical result of this decision was to permit a conciliation commissioner to violate Section 75 (s) (2) by charging $6375.00 rent for 2 years, 8 months, 13 days of

possession of an 80 acre, 20 cow, dairy farm; then order an additional $6375 to be paid within the same time, a total of $12,750; and then order the cows, feed and farm implements to be sold.

Again in *Harris* v. *Zion,* 1943, 317 U. S. 447, over the vigorous dissent of three Justices, it was held that the provision of Section 75 (r) that a personal representative of a deceased farmer is a farmer is dependent upon the law of the state despite the fact that while Section 74 was amended to require state authorization, yet Section 75 (r) was twice thereafter amended without requiring such authorization.

Again in *Carter* v. *Kubler,* 1943, 320 U. S. 243, where it was held that the district court disregarded a vital part of the valuation evidence by throwing out of consideration a $5800 previous valuation by the same court on the ground that it related only to "taxation purposes", yet it was held that the value set without such evidence was binding.

Counsel for the petitioners most respectfully present these facts, though none the less earnestly, because they illustrate the statement that while the other debtor laws embodied in the eight chapters of the Bankruptcy Act are accepted fully in practice, as well as in principle, we still have the unremitting and relentless opposition of the holders of mortgages on farm lands to the practical operation of Section 75. Unless the results of the legislation which created Section 75 are forthcoming in the actual adminis-

tration of farmer debtor cases there is no effective farmer debtor law.

What is involved is apparent when it is considered that in five years 453,000 farmers lost their farms through foreclosure, that is, one in twelve. And within a single year one in every nineteen was completely so wiped out. Address of the Administrator of the Office of Price Administration, February 8, 1944.

A statement made to a Congressional Committee which was printed and later published in the press, that a single corporate mortgage holder had accumulated several millions of dollars from resale of seized mortgaged farms has not been publically denied. Hearings, Special Subcommittee on Bankruptcy of the Committee on the Judiciary, 75th Congress, 2nd and 3rd Sessions, December 18, 1937, page 56.

What is not equally apparent is disclosed only by actual contact with farm realties. The ownership by farmers of the lands they own is the absolute necessity of a strong, virile nation. The number of court foreclosures does not adequately measure the drift to farm tenancy. For every single foreclosure in court there are scores of indebted farmers who are forced to surrender their titles through the intimidation of cunning and relentless mortgage holders. "Sign this deed and we will hold it for you and give you the time you ask; otherwise we will foreclose and put you off" are familiar words.

The history of the unceasing attempts to defeat the purpose of Section 75 by farm mortgage holders is an instance of the "trickle down" economic theory in reverse. Utterly defeated in their attempts to wipe the law off of the stat-

ute books, they have concentrated on preventing the farmer debtors from achieving the fruits of the law. Whenever a farmer debtor succeeds in maintaining his case through the three year stay he faces a strenuous contest for his right to redeem his farm at its value. If the mortgage holder can force the farm to a sale, then the law is utterly emasculated. The mortgage holder has won the battle. He may bid the full amount of his claim without paying down a cent of money and thus force an inflated fictitous value for redemption at a price much greater than if the farmer debtor had capitulated before he ever invoked the farmer debtor law. Thus farmers are "taught a lesson"—not to expect that Section 75 will aid them. New devices are constantly being employed to defeat the law.

What Has Happened in This Meshberger Case.

The device in the present instance is this:

1. The mortgage holder moves the court to set a valuation and time for redemption.

2. The court by order fixes the value and sets a time.

3. The mortgage holder which sought the order contests it by petition for review and appeal.

4. By the time the appeal is determined the time has expired.

If opportunity were afforded and the question would be answered, we would wish to ask what a farmer debtor is to do when confronted by exactly this situation. There is no practical answer that will show the farmer debtor how to save his farm by paying its statutory valuation. The only answer is that he must redeem at the accumulated fictitious paper price fixed by the bid of the mortgage holder plus interest as set by the next to the last sentence of

Section 75 (s)(3). He is thus worse off than when he first invoked Section 75.

If it should seem that there is undue insistence on this subject we repeat that there is intended no disrespect for the court but we would not minimize the earnestness with which it is presented. The amount, either of land, or of money immediately involved, is no indication of the hundreds of thousands of farmers and of the hundreds of millions of dollars that are involved in every farmer debtor case presented to this court.

The petitioners therefore pray that the denial of their petition for certiorari be reconsidered and that the petition be granted.

Respectfully submitted,

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SAMUEL E. COOK,
Huntington, Indiana
Counsel for the Petitioners.

Lima, Ohio
May 17, 1944

Certificate of Counsel.

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ELMER MCCLAIN.

I

SUMMARY OF ARGUMENT

It appears the argument that Congress never gave the Supreme Court any power to reject this appeal and no power to refuse to review the judgment of the Circuit Court of Appeals, as expressly commanded by that Body, is more clearly set forth beginning with paragraph 10 page 15 of this petition. Hence, we will bring that argument back to the head of this petition and restate it as a "Summary of Argument," as follows:

10. The lawyer is an officer of the Courts. He has no choice but must state the law as he thinks it is. If he shrinks and does not do that he is neglecting his duty to the citizen he happens to represent, and in this case to the Supreme Court of the United States.

11. In conclusion permit us to state: That Counsel firmly believes this Court, in refusing to obey the command of Congress, has committed gross error in this: Where did the Supreme Court get the power to refuse to review this judgment? What is the source of its power?

(a) This Court stated in Re Graham 10 Wall. 541 (19 L. Ed. 981) the following:

> "Our jurisdiction is specific and limited. It is defined by the Constitution and laws of the United States. We can exercise none but what is conferred by one or the other." (10 Wall. 541.)

(b) The author of the Digest of the Reports of the Supreme Court of the United States puts it in this language:

> "The United States Supreme Court can exercise no

jurisdiction, except what is conferred by the Constitution and laws of the United States." (110 Wall. 541.)

(c) The Supreme Court held in Cohens v. Virginia 6 Wheat. 264, in the words of the author of the Reports as follows:

> "The United States Supreme Court has no more right to decline the execution of jurisdiction which is given, than to usurp that which is not given."

(d) Chief Justice Marshall in Fisher v. Cockerell, 5 Peters 248, stated on this point as follows:

> "As this Court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it." (5 Peters 248.)

Thus it derives all of its power from the Constitution and the laws of Congress.[1]

12. Tell us where there is any laws of the United States which authorized this Court to decline to review this judgment as commanded by the Congress in Section 24 of the Chandler Bankruptcy Act of June 22, 1938. Congress never gave this Court the power to defeat this Act by refusing to review this judgment and never will. To contend it gave this Court such a power as that is absurd and unreasonable. Neither has the Constitution given it such a power. It has some inherent powers but it will not be claimed that it could use that inherent power to defeat an Act of Congress providing for the review of this judgment. No never. That would be a monstrous proposition. If the Constitution or

[1]We regret that time would not permit of a more thorough examination of the decisions of the Supreme Court, as to its powers and duty in a case like this.

If it happens that this is the first time this question has been raised or presented, in this Court, its decision will be of far-reaching importance in the days to come.

We are confident that the Court has erred in refusing to review the judgment as commanded by Congress.

The law provides a remedy for every wrong. That is why the petition for a rehearing lies here. It is the only remedy and hence must be applied.

the laws of the United States did not give it such a power it follows that it never had such a power at all. Then where would it get such a power. If it had no such power, the order of this Court of May 1, 1944, refusing to review this judgment, is absolutely null and void and does not bind the Debtors. The language of the order, "The application for appeal is also denied," is confusing and void for the reason this Court is not required to allow the appeal. That is allowed by the Act of Congress of June 22, 1938. There is no power on Earth that can defeat said appeal and review. The failure of the Court to mention anything about the review of the judgment, does not change the situation. The Court should have mentioned it. It is in the Act and the Act is a part of the order in question. The failure of the Court to mention it will be taken as a decision against the Debtors and as a refusal to review the judgment.

That ends this story. The order of May 1, 1944, that the appeal was denied means nothing. It does not come within a mile of defeating the appeal, provided for by the Supreme Law of the Land. That stands like a stone wall and the Court might decline to grant it every day but that would not affect it at all. The appeal, as of right, will go on, no difference what this Court may think of it, until Congress repeals said Section 24 of the Chandler Bankruptcy Act. The failure of the Court to mention what it would do about reviewing the judgment amounted to a refusal to review that judgment. The Court should set aside the order as to the appeal as void, and indicate that it would follow the Act of Congress and review the judgment below.

Respectfully submitted,

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May 18, 1944.

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Respectfully submitted,

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Respectfully submitted,

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May 18, 1944.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

RUFUS MESHBERGER AND LELIA B. MESHBERGER, Husband and Wife, *Debtors, Appellants,* v. THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY, *Respondent.*	No. 754

In Bankruptcy Under Section 75—Subsection (s)

DEBTOR'S PETITION FOR REHEARING

TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF SAID COURT:

IV

Come now Rufus Meshberger and Lelia B. Meshberger, husband and wife, and petitions said Court to grant a rehearing in said cause for the following reasons:

1. On May 1, 1944, said Court entered an order in said appeal as follows:

"The application for appeal is also denied."

This action of the Court in an appeal like this, is not like refusing certiorari. This was an order refusing to review the judgment below as commanded by the Act of Congress. The latter commanded the Court to review the judgment of the Court of Appeals. There is no command for certiorari. It entered an order refusing to do so. These Debtors are as helpless as a child to compel the Court to observe this Act. The order is a judgment but a void one and this gives the right for a rehearing. The denial of the petition to review was a dismissal and an order of dismissal is a judgment. The order must be something and it cannot be anything else but a judgment. This Court is the only power on Earth that can review said judgment and save this home. In that view of it, it would be absurd for the Court to claim this order was not a judgment. It ended the case up to that time. To where will the Debtors go for relief except to this Court. Their petition for the right to save their home was cast out of the window.

In the Kalb case, January 2, 1940, this Court held the body of this remedial Act was the Supreme Law of the Land, "Which all Courts—State and Federal—must observe." The Chandler Act above is a part of the Bankruptcy laws enacted by Congress for the relief of American Farmers and all Courts must observe this provision for appeal. It would not be a full law without a provision for appeal and review.

Under the American way, the Debtors had the right to have an order entered showing the reasons for refusing to review the judgment as commanded by Congress and to ask for a rehearing. If this Court declines to enforce this right to redeem it will defeat their right to redeem the land at its appraised value and all is gone.

2. Previous thereto the Debtors had filed a second paragraph of petition for an appeal, as of right, in said cause from the Circuit Court of Appeals for the Seventh Circuit, with an assignment of errors and a supporting brief, and gave notice to the Creditor. That perfected the appeal. The Court had nothing to do with giving the appeal. The Act of Congress gave the appeal. The sole thing the Court was required to do was to review the judgment below and carry out the will of Congress. To deny a petition to review this judgment was not reviewing it at all.

3. Proper notice of appeal was given to the Respondent, but it paid no attention to that and did not even file any opposing brief as required by the Rules. It thereby admitted the petition was true. Neither did the Honorable Court state in its judgment the grounds upon which it denied their petition. If that is according to the rules they should be changed. A word or so would have rendered a great service to Debtors' Counsel and enabled him to show the Court wherein it had erred. As it is he must walk in the dark. He was entitled to walk in the light.

4. There was no reason why the Court should have denied the petition and refused to review the judgment of the Circuit Court of Appeals. We will show it had no power whatever to do that. Counsel will have to guess as to why the Court denied the petition and refused to review the judgment of the lower Court. Hence, it will require him to argue three supposed grounds upon which the Court might have based its ruling. Keep in mind, there was no reason which authorized it to refuse to obey the will of Congress and refuse to review said judgment below. Supposed grounds:

(1) That Congress in the Chandler Act Section 24 (a), (b), (c) and Section 47—11 U. S. C. A. (a), (b), (c) did not

provide for an absolute appeal, as of right, from the judgment of the Court of Appeals to the Federal Supreme Court in cases of this kind and hence the petition for appeal should be denied. In that the Court greatly erred.

(2) That Congress in said provisions above, did provide an absolute appeal, as of right, and the appeal here was not properly taken: That is, the petition was defective and did not bring the case within these provisions of said Act.

(3) Or the case presented did not show the Debtors were entitled to any relief on the merits of the case. These in their order.

(1) Did Congress provide an appeal, as of right, and require this Court to review the judgment below?

1. It will be admitted that the original Section 75 of the Bankruptcy Act of March 3, 1933 did not provide for any appeal to the Supreme Court in Bankruptcy cases. It contained only the substantive provisions for the relief of the "distressed farmer." The Act which gives an absolute appeal is as stated above the Chandler Act enacted June 22, 1938. In effect September 22, 1938. Hence, it was in effect when the judgment herein was entered on December 2, 1942. The second clause (b) referring to appeals in proceedings in bankruptcy provides:

> (b) "Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal." Chandler Act, June 22, 1938, Sec. 24(b)—11 U. S. C. A. Sec. 47(b).

2. Congress meant by that language to broaden the right of Appeal in bankruptcy proceedings; to provide for an absolute appeal, which should exist without any allowance of an appeal, as in certiorari, and that it was an appeal as a "matter of right" independent and in addition to a peti-

tion for certiorari and did not have to be allowed by any Court. When Congress gave this right it intended the Court must review the judgment below. It is imperative. There is no choice about it and must be obeyed, "though the Heavens fall."

3. The next section (c) settles the question beyond all doubt. It is as follows:

> "(c) The Supreme Court of the United States is hereby vested with the jurisdiction to review judgments, decrees and orders of the Circuit Court of Appeals of the United States . . . in proceedings in bankruptcy under this act in accordance with the provisions of the law of the United States now in force or such as may hereafter be enacted." Chandler Act, Sec. 24(c)—11 U. S. C. A. Sec. 47(c).

This is as clear as the Sermon on the Mount. Can any one question the power of Congress to enact this law and thereby provide for an appeal as of right? No, all power to impair the obligation of contracts was denied to the States and the latter delegated all of such powers to Congress, and in enumerating its great powers added: "To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States." Sec. 8 Clause 4—Constitution.

In Norman v. Baltimore 294 U. S. 240 (79 L. Ed. 885) this Court held this power (to cancel or discharge debts) was among the greatest powers of the Congress and is in the class with the power "to coin money and regulate the value thereof" or "to declare war" which costs the lives and property of our citizens. To reach the proper conclusion, we must consider the question in the instant case as a bankruptcy question. Like Chief Justice Marshall observed in the McCulloch case: "In considering this question then,

we must never forget that it is a Constitution we are expounding."

At the close of the enumeration of these powers the Constitution also gave Congress the power—"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers." No litigant has ever claimed this clause, (c) of the Chandler Act, is unconstitutional or void. No Court has ever so held it. It stands today as a living part of the Bankruptcy Act and this nor no other Court has the power to wipe it out or blot it from the Statute Books. It must be enforced. It must be enforced, or the whole remedial Act for the relief of the "distressed farmer" will be only a half law and hence a sham.

4. That clause certainty applies to the case at Bar and provides for an absolute direct appeal, as a matter of right, from the Circuit Court of Appeals to the Federal Supreme Court, in "proceedings in Bankruptcy," without any action by the Court, and also provides that that Court must review said judgment of said Court of Appeals. The Supreme Court is intended to enforce the will of the Congress. For all legislative power is vested in that great body. If it is charged with the duty to review this judgment, it must exercise that power. It cannot refuse to review. It is the only body charged with that duty. It can not abdicate, renounce or surrender that power, or shift that duty. They are asking "for bread and must not be given a stone." They are helpless. To refuse to review it would be arbitrary, capricious and null and void.

5. The action of Congress made the appeal the Supreme Law of the Land. All officers of the United States shall be bound by oath or affirmation to support the Constitution and the laws made under it. Many cry Constitution! Consti-

tution! and yet oppose every Act of Congress enacted to carry it out.

It is conceded this Court has certain powers to make rules for the conduct of and to expedite the business before it, but no one will contend that it has the power to make a rule which would nullify or overthrow the Supreme Law of the Land. Hence no Rule of this Court could defeat this appeal and review created by this Congress. All such Rules would have to yield and give way to the Supreme Law of the Land.

A great President said on this point:

> "Our Constitution does not contain the absurdity of giving power to make laws and another power to resist them."

6. This Act providing for this appeal, as of right, and providing this Court has the power to review this judgment, means this Court must execute it. It is one of the means adopted by Congress to execute its Constitutional powers over the "subject of bankruptcies." Congress is the judge of the means it will employ in executing its Constitutional powers. No court can review that power.

McCulloch v. Maryland, 4 Wheat. 316.

7. Rule 38—(5) of this Court that "A review on a writ of certiorari is not a matter of right but of sound judicial discretion"—will stand as the Rule in all appeals other than in Bankruptcy. But in an appeal in proceedings in Bankruptcy as here, the above Chandler Act applies and expressly provides for an absolute appeal and review of the judgment in a proceeding in Bankruptcy. This statutory appeal is an absolute appeal and review and does not need to be allowed by any Court but can "be executed by an appeal and in the form and manner of an appeal." Con-

gress and not the Court gives the right of appeal. All this Court has to do with it is to review the judgment below. That means the litigant shall file the transcript or record in the Supreme Court, attach an assignment of errors and a supporting brief and then gives the opposite party notice that such papers have been filed with the same. The record shows this is a proceeding to redeem the land at its appraised value. It is one of the steps in the Administration of the Act. Hence, it is a "proceedings in Bankruptcy."

8. As to the wisdom, propriety or necessity for such an appeal and review in Bankruptcy proceedings, different from the Rule as to certiorari, that was a matter wholly for the consideration of Congress to decide, and not for the Courts. If that appeal and review can be defeated by the Courts refusing to enforce it that would amount to the Judicial Department of our Government encroaching upon the powers of the Legislative Department, and would be an attempt to make a law to defeat a law of Congress.

9. At this point an idea came which was not thought of when starting the preparation of this petition for a rehearing. It is this:

On page 17 of the Debtors' petition for appeal they set out Section 24 (a), (b), and (c) of the Chandler Bankruptcy Act of June 22, 1938, and Sec. 47 11 U. S. C. A., (b) and (c) of September 22, 1938, under the head of "How shall this appeal be taken?" This informed the Court that the Debtors were appealing under said sections (b) and (c).

10. A strange thing happened. The Court on May 1, 1944, notified Counsel for the Debtors as follows:

"The application for appeal is also denied." But was silent as to the review.

From this, the Court knew the Debtor had taken an

appeal and had based it on these two clauses of the Chandler Act. Thus the Court in denying the petition and thereby refusing to review, must have meant to state that the Debtors had taken an appeal for a review in the usual sense of that term and that it was based upon said clauses (b) and (c) of said Act. When it denied the appeal that amounted to holding clause (b) and (c) of said Act did not provide for such an appeal and review in Bankruptcy cases or that the Rules of the Court requiring the consent of the Court applied. The appeal under said Chandler Act was an appeal as of right and hence could not be defeated by the Rules of the Court. The Court was required to review the judgment and it could not stop the appeal or refuse to review the erroneous judgment below. Of what avail would it be for Congress to take the time to enact this provision for an appeal and review if the Court could disregard it and refuse to enforce it.

In denying the petition for an appeal the Court must have meant this section (c) does not provide for an absolute right of appeal and review of the judgment below. Why was the review not mentioned in the order? This will be explained later.

A law not enforced or applied is a "dead letter" and no law at all, and is an instrument of confusion and injustice.

11. As stated above this Act for an appeal and review only applies to cases in "proceedings in Bankruptcy." If this appeal is a matter of right and the Court must review the judgment below and this should increase the business of this Court, that would be no reason why it should not be enforced. That was a question for Congress to settle and this Court would have nothing whatever to do with it. However, the law favors the right of appeal. (2 R. C. L. p. 100.)

12. Let us turn back and again notice the language of this Act: It states:

> "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees and orders of the Circuit Court of Appeals of the United States . . . in proceedings under this Act in accordance with the provisions of the laws of the United States, now in force or such as may hereafter be enacted." Sec. 24 (c) Chandler Act, June 22, 1938 (Sept. 22, 1938) Clause (c) Sec. 47 (11 U. S. C. A.)

It states:

> "In proceedings under this Act in accordance with the provisions of the laws of the United States now in force . . ."

In construing an Act every part of it must be read and considered.

Applying that rule, clause (a) of the Act provides appeals can be taken—"In proceedings in Bankruptcy." Hence the clause (c)—"Under proceedings under this Act" means "In proceedings in Bankruptcy." Then clause (c) states the appeal can be taken—"In accordance with the provisions of the laws of the United States." Clause (a) of said Act provides for an appeal from the District Court to the Circuit Court of Appeals. That means the appeal to the Supreme Court should be taken like an appeal is taken from the District Court to the Circuit Court of Appeals. Everyone knows that is done by filing the transcript in the Court of Appeals and giving notice to the opposing party, filing an assignment of error, or statement of points, brief, etc.

The whole Act shows beyond all doubt that that was the way Congress intended the appeal to the Supreme Court should be taken. Clause (b) strengthens that position when

it provides: "Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

If clause (c) of this Act does not provide for an appeal, as of right, what in the world is it? It is copied in said Chandler Act. If not for an appeal it should be blotted out of the statute book. Congress meant what it said. That from every judgment in bankruptcy proceedings an appeal lay to the Supreme Court. There was no mystery about the manner of the appeal—that is, how it should be taken.

The context in clause (a) and (b) conclusively shows that it should be taken like an appeal is taken from the District Court to the Circuit Court of Appeals. That is so plain "that he who runs may read." Just a simple appeal—that is all. Congress intended in using the word "appeal" to use it as that term has been used for centuries. It is thus defined: "The removal of a cause from a Court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial." Bouviers Law Dictionary, Vol. 1 p. 127. Paul when wrongly accused said; "I appeal unto Caesar."

13. What is this Bankruptcy Act? This Court defined the Act in Wright v. Union Central as follows:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt."

And it must be construed as follows:

> "Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property . . . There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly

is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress." (P. 168-169.)

Wright v. Union Central, 311 U. S. 273.

14. The merits of the case is governed by equitable rules as follows: Brandenburgh on Bankruptcy, Fourth Edition, Sec. 10, p. 27:

> "As a Court of Equity, it will deal with the rights of the parties upon their merits, rather than be controlled by strict legal forms, and will seek to administer the law according to its spirit and not merely by its letter. It follows that within the limits prescribed by the Bankruptcy Acts and the special rules of practice prescribed by the Supreme Court, bankruptcy proceedings are to be administered in accord with the general principles and practices of equity, and this applies to the corrections of mistakes in judgment and other matters of record injurious to the rights of the parties." Many cases cited.

16. This is a new remedial Act and should be construed as follows:

> "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief and the remedy; that is, how the common law stood at the making of the Act. What the mischief was, for which the common law did not provide; and what remedy the Parliament hath provided to cure this mischief. And it is the business of the Judges to so construe the Act as to suppress the mischief and advance the remedy." (Vol. 1—Introduction, Sec. 3 (Star Page 87) bottom page 53, Blackstone's Commentaries on the Laws of England.)

17. The action of the Court in denying the appeal means one of two things: (1) That the Chandler Act does not provide for an appeal, or (2) that if it does, the appeal was not properly taken. I am inclined to think it denied the appeal and refused to review the judgment and based the order on the claim that no appeal or review is provided for by said Chandler Act.

18. We shudder at the consequences of refusing to review this judgment! Suppose in some way in a later decision of the Courts, it was established, beyond all doubt, that Congress intended to provide for an appeal and unconditional review of the judgment below by virtue of Section 24 of the Chandler Act. The result of the action of this Court in refusing to follow the Act of Congress would deprive the Debtors of the benefits of this Act and deprive them of the right to save their home. (It would be final and no appeal could be taken. There would be no remedy.) What an awful injustice that would work. The only safe thing to do here is to review this challenged judgment and see whether the Debtors should lose their home.

19. It has been urged that a Court has a right to decide wrong as well as right. We deny that proposition. It must be right or it is void. The violation of a statute creates an incurable situation. "A question is not settled until settled right."

20. The body of this Chandler Act and the context show beyond all doubt that this appeal is from "proceeding in bankruptcy." Hence, it comes within the Act and it is the unquestioned duty of the Court to carry out the will of Congress by reviewing the judgment of the Court of Appeals. Every question and issue in the case is properly presented as solely a question of law. The sole duty of this Court as commanded by the Supreme Law of the Land is to review

the judgment below. That means the review is imperative. That does not mean that the Court can run over the questions presented and anticipate the decision it would make on the merits of the case. Congress did not mean such a foolish thing as that. It meant it must review the decision below regardless of what that decision would be. For example: Suppose a Court is about to hear the evidence and argument and decide a case in nisi prius Court. The Judge could not look over the papers and refuse to hear the case and pick up his pen and dismiss it. That would not be a trial. Neither would the refusal of the Court here to consider the case be a review of the judgment here.

21. A review means "To re-examine judicially, as a higher Court may review the proceedings and judgment of a lower one"; . . . "Judicial examination, as of the proceedings of a lower Court by a higher."—*Webster.*

To deny the petition to review a judgment is not reviewing that judgment at all. To review the judgment means the higher Court must re-examine every part of the judgment below and every legal question presented or raised and if they do not coincide with sound law, to so find and change or set aside the judgment and order a new one entered to conform to the law.

To deny the petition as was done here was a judgment but was not a review judgment as was intended by Congress in the Chandler Act. Why contend further it is as plain as the "noon day sun" that this Court greatly erred in denying the petition to review the judgment and in refusing to re-examine it and in not reviewing it. This prohibited it from dismissing the petition. The order denying the petition is null and void and of no effect in law and should be set aside without delay.

(2) The second possible ground is that Congress did

provide for an appeal and a review but the appeal was not properly taken.

1. There is nothing in the record to sustain that position. The record shows the Debtors filed a petition for an appeal, as of right, to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered December 2, 1942, to the Supreme Court of the United States. The merits of the case are set out in a 22 page petition. The Debtors also filed a 17 page assignment of errors of the Court of Appeals. Then it filed a 28 page supporting brief. In each of these papers the Debtors set out Section 24 (c) of the Chandler Act as follows:

> 1. (c) "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

2. We again call attention to the fact that clause (a) of said Section 24 must be read with (b) and (c) as follows:

> "SEC. 24. JURISDICTION OF APPELLATE COURTS.—a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to re-

view, affirm, revise, or reverse, both in matters of law and in matters of fact." Chandler, p. 17.

3. It is as plain as day that Congress was providing for an absolute appeal, as of right, in clause (a) from the District Court to the Circuit Courts of Appeals. It is provided: (b) "Such jurisdiction shall be exercised by appeal and in the form and manner of an appeal." That means no allowance of appeal by the Court was required but an absolute appeal without any action of the Court. If Congress had intended to make the appeal depend upon such an allowance, it would have said so and would not have used the language in clause (b).

4. Congress meant an appeal as defined by Bouvier: "The removal of a cause from a Court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and trial." That is as old as the law itself.

Every step has been taken and the appeal has been properly perfected. The papers and case are in the Supreme Court and nowhere else and Congress has specifically commanded the Court to review the judgment in question.

5. Though we do not fear the result of a review of the merits of the case presented by the appeal, yet, we do not concede that this Court can consider its merits to determine whether it will review the case. It is commanded by the Law of the Land to review which is a judicial re-examination of the legal questions presented in the judgment. There is no condition attached to the clause. The Court is absolutely ordered to re-examine the judgment regardless of the consequences or merits of the case. It has no discretion in the matter.

6. On the theory that the Court must review the judgment we will say a word about the merits. It is shown in

the Debtors second paragraph or petition for an appeal as of right, the assignment of errors and the supporting brief, and not denied that the Supervising Commissioner fixed the value of the land at $6,000 and fixed the time to redeem in one year from May 27, 1941 (or July 10, 1941 when the Court confirmed his report) that the Respondent at once, appealed from said judgment to the Circuit Court of Appeals. That it filed all of the papers required to perfect said appeal and also a supporting brief and contended therein that said $6,000 was too low, (That it should have been about $8,000) and said time to redeem was too long. (They believe it orally argued said appeal in said Court.) That said appeal was affirmed in said Court of Appeals over one year from July 10, 1941, namely, October 9, 1942.

7. The decision of this Court in the Bronson case (17 L. Ed. 616) held that the action of the Creditor in so appealing suspended the execution of said judgment by said Creditor and prevented it from enforcing it against the Debtors and operated as a supersedeas. It was dormant until the Creditors appeal was terminated on October 9, 1942. This Court said:

> "They (the parties) having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert that the decree is founded in error and for that reason should not be executed, but should be reversed and corrected in the Appellate tribunal. The Appeal suspends the execution of the decree. (Bronson v. LaCross, 1 Wall. 405, 17 L. Ed. U S. 616)."

The case has never been overruled but Rose's Notes show it has been approved by a number of subsequent decisions. The position of the Creditor is absurd—that it could attack

the judgment and seek to overthrow it and at the same time have it run against the Debtors. If the Creditor could not take any steps to enforce it while it was appealing, it follows it could not enforce it as against the Debtors. If it could not enforce it, it was dormant and the time to redeem could not run against them. The Court of Appeals in its judgment paid no attention to this great decision of this Court which stands, like a stone wall, in its way to take this land from the Debtors.

8. Then there is another error in said judgment in this: The Supreme Court in Wright v. Union Central (December 9, 1940—311 U. S. 273) held that the Creditor could only collect the appraised value of the land—and not a penny more. $6,000 here and that was paid into Court in time and is now in the Registry of said Court and the Court of Appeals should have followed the Bronson case and the other authorities cited and ordered said Creditor to accept said redemption money. No, like Micawber, its plate is up all of the time. The evidence showed and was not disputed that the Creditor had kept $450 out when the loan was made and that the Debtors never did receive it and yet the District Court entered judgment against the Debtors for this sum and the Court of Appeals paid no attention to that but approved it. (The Debtors are informed that since said decision said Creditor has advertised that it would pay the money it kept out in other like cases and that it is now paying said money or stock back to other Debtors.) This error of the Court in approving said order of the lower Court is enough to reverse said judgment below.

9. This is not all. As set out in said petition for a review, the assignment of errors and supporting brief, all of the authorities starting with said Wright appeal (311 U. S. 273) all hold that all said Creditor can collect is the appraised value fixed by said Court at a hearing of the testimony of

witnesses, which was $6,000, and no more. That it cannot collect said rent in addition to said appraisal. The Creditor questioned that amount by its appeal as set out but the Court of Appeals affirmed said judgment and that was the end of that question and it is conclusively bound thereby. The present attack is a collateral attack on it and must fail for that reason.

In spite of the law the Creditor claimed the right to recover rent in the hands of the Trustee in said cause in the sum of $843 and said District Court erroneously allowed that and the Court of Appeals approved that. On the question that that was error we cited—In re Ezell, 45 Fed. Supplement 164. This alone should reverse said judgment.

10. The lawyer is an officer of the Courts. He has no choice but must state the law as he thinks it is. If he shrinks and does not do that he is neglecting his duty to the citizen he happens to represent, and in this case to the Supreme Court of the United States.

11. In conclusion: Permit us to state: That Counsel firmly believes this Court in refusing to obey the command of Congress has committed gross error in this: Where did the Supreme Court get the power to refuse to review this judgment? What is the source of its power. This Court stated In re Graham, 10 Wall. 541 (19 L. Ed. 981) the following:

(a) "Our jurisdiction is specific and limited. It is defined by the Constitution and laws of the United States. We can exercise none but what is conferred by one or the other." (10 Wall. 541.)

(b) The author of the Digest of the Reports of the Supreme Court of the United States puts it in this language:

"The United States Supreme Court can exercise no

jurisdiction, except what is conferred by the Constitution and laws of the United States." (10 Wall. 541.)

(c) The Supreme Court held in Cohens v. Virginia, 6 Wheat. 264, in the words of the author of the Reports as follows:

"The United States Supreme Court has no more right to decline the execution of jurisdiction which is given, than to usurp that which is not given."

(d) Chief Justice Marshall in Fisher v. Cockerell, 5 Peters 248, stated on this point as follows:

"As this Court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it." (5 Peters 248.)

Thus it derives all of its power from the Constitution and the laws of Congress.

12. Tell us where there is any laws of the United States which authorized this Court to decline to review this judgment as commanded by the Congress in Section 24 of the Chandler Bankruptcy Act of June 22, 1938. Congress never gave this Court the power to defeat this Act by refusing to review this judgment and never will. To contend it gave this Court the power to defeat this Act is absurd and unreasonable. Neither has the Constitution given it such a power. It has some inherent powers but it will not be claimed that it could use that inherent power to defeat an Act of Congress providing for the review of this judgment. No, never. That would be a monstrous proposition. This right of review must stand and be enforced by this Court. If the Constitution or the laws of the United States did not give it such a power it follows that it never had such a power at all. Where would it get such a power? If it had

no such power, the order of this Court of May 1, 1944 refusing to review this judgment, is absolutely null and void and does not bind the Debtors. The language of the order, "The application for appeal is also denied," is confusing and void for the reason this Court is not required to allow the appeal. That is allowed by the Act of Congress of June 22, 1938. There is no power on Earth that can defeat said appeal and review. The failure of the Court to mention anything about the review of the judgment, does not change the situation. The Court should have mentioned it. It is in the Act and the Act is a part of the order in question. The failure of the Court to mention it will be taken as a decision against the Debtors and as a refusal to review the judgment.

That ends this story. The order of May 1, 1944, that the appeal was denied means nothing. It does not come within a mile of defeating the appeal, provided for by the Supreme Law of the Land. That stands like a stone wall and the Court might decline to grant it every day but that would not affect it at all. The appeal, as of right, will go on, no difference what this Court may think of it, until Congress repeals said Section 24 of the Chandler Bankruptcy Act. The failure of the Court to mention what it would do about reviewing the judgment amounted to a refusal to review the judgment. The Court should set aside the order as to the appeal as void, and indicate that it would follow the Act of Congress and review the judgment below.

Enough has been said. We hope we have aided the Court.

Respectfully submitted,

RUFUS MESHBERGER,
LELIA B. MESHBERGER,
Debtors.

May 18, 1944.

STATE OF INDIANA }
COUNTY OF JAY } ss:

Rufus Meshberger being duly sworn on his oath says, he is one of the Debtors in the above cause and is familiar with the same. That the facts set out therein are true, as he is informed and verily believes.

RUFUS MESHBERGER,
By Said Rufus Meshberger.

Subscribed and sworn to before me this 18th day of May, 1944.

SAMUEL E. COOK,
Notary Public.

My Commission Expires April 7, 1947.

STATE OF INDIANA }
COUNTY OF HUNTINGTON } ss:

Samuel E. Cook, Counsel for Debtors in the above cause does hereby certify that in his opinion the above petition for a rehearing in said cause is well founded and is presented in good faith and not for delay.
May 18, 1944.

SAMUEL E. COOK,
Counsel.

SAMUEL E. COOK,
Huntington, Indiana,
ELMER MCCLAIN,
Lima, Ohio,
Counsel for Petitioners.